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James W. Cree

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TESSARI PATENT LAW GROUP, PLLC  
301 LINDENWOOD DRIVE - SUITE 206  
MALVERN, PA 19355

EXAMINER

VONCH, JEFFREY A

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## **DETAILED ACTION**

### ***Response to Arguments***

1. Applicant's arguments filed December 7<sup>th</sup>, 2009 with respect to claims 41-43 and 45-47 have been considered but are not persuasive.
2. Regarding the Section 112 rejection of the term 'localized disturbances', the term could be interpreted to mean a z-directional rearranging that reorients some fibers just enough to expose the film. The phrase does not inherently mean just apertures or apertures at all. All IMG activation would provide some fiber rearrangement enough to impart breathability therefore exposing the film. Therefore, all IMG patents that activation stretch or intermesh should inherently create localized disturbances according to Applicant's admission. Intermeshing elastic/nonwoven laminates following lamination/bonding is well-known in the art and goes as far back as Sabee (U.S. Patent No. 4,153,664) and Wu (U.S. Patent No. 5,861,074). Although the Applicant's have persuasively argued that the term is well-defined the definition of the term localized disturbances is still rather vague as it is process dependent.
3. Regarding the rejection of claim 41, Applicant argues that apertures in the nonwoven layer are created by activation stretching in Curro et al. (WO 2000/37249) (hereinafter "Curro") before lamination/bonding rather than after, therefore the claimed invention is not anticipated.
4. However, the limitation of activation stretching after bonding, however, is a product-by-process limitation and that the structure of Curro would still anticipate the claimed structure regardless of when the nonwoven layer was activation stretched. It is not apparent how activation stretching the entire laminate causes a non-anticipated difference in the final structure than activation stretching the nonwoven only before lamination. It was not indicated in the

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response as to how the actual structure would differ, only how Benson would not apply properly to stretching the entire laminate and how the process limitation is not taught by Curro.

Regardless of when the nonwoven layer was activation stretched to create apertures, before or after lamination, it would result in the same localized disturbances that would expose the film as disclosed in Curro (page 13, paragraph 4) with the nonwoven exposing the vacuum-formed apertured film with the surface gradient as claimed (page 3, Summary of Invention).

Furthermore, since there is no unexpected showing that activation stretching the entire laminate would not form apertures that expose the film to form the same composite as Curro, it being well-known in the art to activation stretch elastic/nonwoven composites as recited above, the claimed laminate would also be obvious.

5. Furthermore, absent a showing to the contrary, it is Examiner's position that the article of the applied prior art is identical to or only slightly different than the claimed article. Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. *In re Thorpe*, 227 USPQ 964, 966 (Fed. Cir. 1985). The burden has been shifted to Applicant to show unobvious difference between the claimed product and the prior art product. *In re Marosi*, 218 USPQ 289 (Fed. Cir. 1983). The applied prior art either anticipated or strongly suggested the claimed subject matter. It is noted that if Applicant intends to rely on Examples in the specification or in a submitted declaration to show unobviousness, Applicant should clearly state how the Examples of the present invention are commensurate in scope with

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the claims and how the Comparative Examples are commensurate in scope with the applied prior art.

6. Therefore, absent evidence of criticality regarding the presently claimed (process) and given that a nonwoven/elastic laminate, wherein the nonwoven's localized disturbances (apertures) expose the elastic film, with a surface energy gradient meets the structural requirements of the claimed composite, Curro's laminate clearly meet the requirements of Applicant's invention.

7. In conclusion, regarding claim 41, Applicant was correct in arguing that Curro did not teach stretching the unified structure but the Examiner holds the position that the invention, although formed by a different method, is not different from the claimed invention (and would also be obvious given the state of the prior art and the definition of the formation of localized disturbances).

8. Regarding the rejections of claim 44, the act of vacuum lamination is well-known regardless of breathability of the non-woven layer. Thomas would make obvious laminating a non-woven (breathable or not) to a breathable vacuum-formed film.

### ***Conclusion***

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jeff A. Vonch whose telephone number is (571) 270-1134. The examiner can normally be reached on Monday to Thursday 8:30-6:00 EST.

10. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David Sample can be reached on (571) 272-1376. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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11. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/David R. Sample/  
Supervisory Patent Examiner, Art Unit 1794

/J. A. V./  
/Jeff A. Vonch/  
Patent Examiner, Art Unit 1794  
December 11<sup>th</sup>, 2009